STATE OF NORTH CAROLINA
COUNTY OF FORSYTH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
14-EDC-06398

[redacted] by and with his parents, [redacted]
and [redacted],
Petitioners,

v.

WINS TON-SALEM/FORS YTH
COUNTY BOARD OF EDUCATION,
Respondent.

FINAL DECISION

THIS MATTER was heard before the undersigned Honorable Selina M. Brooks, Administrative Law Judge Presiding, on October 15, 2014 in Winston-Salem, North Carolina; on November 17-18 and November 20, 2014 in Thomasville, North Carolina; and on November 24, 2014 in Lexington, North Carolina.

At the beginning of the hearing, Petitioner [redacted] made a motion for the hearing to be open to the public. After speaking directly to the Undersigned on the record and personally making his request, the Undersigned granted the motion over the objection of Respondent.

At the close of the Petitioners' evidence, Respondent made a Motion To Dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure. After careful consideration of the sworn testimony of the witnesses and the exhibits offered and admitted into evidence, and after hearing arguments on the motion from counsel for both parties, the Undersigned determined that this matter should be dismissed with prejudice and in its entirety,

APPEARANCES

For Petitioners:
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For Respondent:
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ISSUES

In the Pre-Trial Order, the parties jointly agreed that the issues to be decided in this contested case are as follows:

1. Did the Winston-Salem/Forsyth County Board of Education offer [redacted] a free appropriate public education for the 2013-2014 school year?

2. If the Tribunal finds that the Board did not offer [redacted] a free appropriate public education for the 2013-2014 school year, do Petitioners have a legal claim for reimbursement for the private program selected for the 2013-2014 school year, and if yes, was the private program selected appropriate?

3. If the Tribunal finds that the Board did not offer [redacted] a free appropriate public education for the 2013-2014 school year, do the Petitioners have a legal claim for reimbursement for the private program selected for the 2014-2015 school year, and if yes, was the private program selected appropriate?

4. To what reimbursement, if any, are Petitioners entitled?

During the contested case hearing by admission of their counsel, Petitioners acknowledged that they were not arguing that the IEP goals and proposed methodology were inappropriate. (Tr. vol. V, 1129-1130, 1143-1144.)

Counsel for Petitioners primarily challenge the District's capacity to implement the IEP developed for the 2013-2014 school year and the training of the teachers assigned to implement Trey's special education services. *(Id.;* Tr. vol. V, 1147.)

BURDEN OF PROOF

Petitioners bear the burden of proof by a preponderance of the evidence. (Stip. 9; *see Schaffer v. Weast,* 549 U.S. 49, 57-58 (2005); N.C. Gen. Stat. §150B-34(a).)

STANDARD OF REVIEW

The North Carolina Rules of Civil Procedure provide, in pertinent part:

> After the plaintiff, in an action tried by the Court without a jury, has completed the presentation of evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The Court as trier of the facts may then determine them and render judgment against the plaintiff [.]

N.C. Gen. Stat. § 1A-1, Rule 41(b).

"When a motion to dismiss pursuant to 41(b) is made, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given to their testimony." *Dealers Specialties, Inc. v. Neighborhood Housing Servs,, Inc,,* 305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982). Moreover, in determining the sufficiency of the evidence when ruling on a motion to dismiss made under Rule 41(b), the judge is not bound to make inferences in favor of the Petitioner's evidence. *Id,* at 638, 291 S.E.2d at 140. Where the Petitioner's evidence shows no right to relief, the Respondent is entitled to have its motion to dismiss granted, *Employers Mut. Cas. Co, v. Griffin,* 46 N.C. App. 826, 827, 266 S.E.2d 18, 19 (1980); *see also Hill v. Lassiter,* 135 N.C. App. 515, 520 S.E.2d 797 (1999).

WITNESSES

For. Petitioners: [redacted], petitioner
Doreen Hughes, MD
Rebecca Felton, PhD
Sam Dempsey
Carol Fish
Patricia Collins, PhD
Corliss Thompson-Drew, PhD
Frank Balch Wood, PhD
[redacted] petitioner
Kevin Pendergast

For Respondent: No witnesses

EXHIBITS

The following Joint/Stipulated Exhibits were received into evidence: Nos. 1-30.

The following exhibits were received into evidence: Petitioners' Exhibits Nos. 2, 6, 7, 8, 10, 17, 19, 33, 34, 36, 38, 47.

Respondent's Exhibits Nos. 1, 2, 3, 4, 5, 8, 9, 10, 11, 12.

The exhibits have been retained as part of the official record of this contested case.

STIPULATIONS

The parties proposed a Pre-Trial Order, which was approved and filed in the Office of Administrative Hearings on October 15, 2014.

The parties stipulated to the following undisputed facts prior to the start of the hearing:

a. [redacted] has not attended a Winston-Salem/Forsyth County ("WSF" or "District") school since the 2010-2011 school year. [redacted] last attended a school within the District in June 2011. In July 2011, [redacted] and [redacted] rejected an IEP developed in July 2011 that proposed [redacted] placement at [redacted] High School in the District and first placed him at a private school in Winston-Salem, then subsequently at The [redacted] School [redacted]), a residential boarding school in up-state New York. [redacted] is a fourth-year high school student currently attending [redacted]. Of his thirteen years of formal education, only four have been spent in a District school.

b. When [redacted] last attended a school within the District, [redacted] was classified as a child with a disability for the purposes of the IDEA, 20 U.S.C. §1400 *et seq.* and a child with special needs within the meaning of N.C. Gen. Stat. 115C, Article 9. Being then domiciled in Forsyth County, he was entitled to a free appropriate public education (FAPE) from the Respondent.

c. [redacted] is currently [redacted] years old and has reached the age of majority. Pursuant to NC 1504-1.12, all rights accorded to [redacted] parents [redacted] and [redacted] under Part B of the IDEA transfer to [redacted].

d. The parties entered into a Settlement Agreement and Consent Order filed with the N.C. Office of Administrative Hearings on October 16, 2012, which released the District from all claims "arising out of or on account of the matters alleged in (or which could have been alleged in) or relating to" the petitions filed at OAH Docket No. 11-EDC-11823 and OAH Docket No. 11-EDC-06068.

e. IEP meetings were held on August 23, 2013 and September 25, 2013 to develop an IEP for Trey.

An Addendum to the Pre-Trial Order was entered on November 7, 2014. The stipulations contained in both the Pre-Trial Order and the Addendum to the Pre-Trial Order, and as may otherwise appear in the official record of this contested case, are incorporated herein by reference.

After weighing all of the admissible evidence, including the Stipulations of record, and assessing the credibility and reliability of the witnesses, the Undersigned makes the following:

FINDINGS OF FACT

BACKGROUND

[redacted] is an **18**-year-old, severely [redacted] high school student with average intelligence who lacks fundamental reading skills. (Pet. 2, 9; Stip. Exs. 19 & 20.) While [redacted] is currently a senior at [redacted], his exposure to the District is limited and he last attended a school within the District in June of 2011 as an eighth grade student. (Stip. 12.)

2, As a kindergartener, [redacted] attended a District school where he was identified as a child in need of special education services, At the end of that year, Petitioners withdrew him from the District, opting instead to place him in a local charter school where he remained for the next six years and returned to the District as a sixth grader. (Pet, ¶¶ 4, 5; Tr. vol. I, 33.)

3. [redacted] remained in a District school for the next three years. (Pet. ¶ 6.) At the end of T[redacted] eighth grade year, Petitioners withdrew him from the District, placed him at [redacted] Academy, a private school in Winston-Salem, and filed their first due process petition which they subsequently dismissed without prejudice. (Pet, ¶ 22; Tr. vol. I, 44; Tr, vol. III, 604.)

4. In August of 2012, following a year at [redacted] Academy, Petitioners enrolled [redacted] as a residential student at [redacted], a small private school in New York that serves only [redacted] students. (Stip. 12; Tr. vol. V, 987.) Petitioners then filed a second due process petition against the District seeking reimbursement for tuition expenses. (Pet. ¶ 24.)

5. At [redacted], [redacted] functions in a text-free environment. (Tr. vol. V, 1140.) In his core classes, [redacted] accesses age appropriate materials largely through the use of extensive assistive technology and read-aloud accommodations. (Tr, vol. V, 1011-1012.) All of [redacted] homework is delivered to him electronically, (Tr. vol. I, 94.) [redacted] does not take notes or use a pen in the classroom. (Tr, vol. V, 948.) By his own testimony, [redacted] takes videos in his classes and listens to them to review class discussions. (Tr. vol. V, 948-949,) [redacted] "writes" by dictating to speech-to-text software. (Tr. vol. V, 959.)

6. On October 15, 2012, the parties entered into a settlement agreement for the second due process petition, resolving all outstanding claims through the 2012-2013 school year. Pursuant to this agreement, [redacted] enrollment at [redacted] for the 2012-2013 school year was not his "stay-put" placement. The District further agreed to contract with a mutually agreeable outside evaluator to conduct psychological, educational, and assistive technology evaluations during the summer of 2013 and to develop an IEP for [redacted] for the 2013-2014 school year. (Stip. Ex. 1; Tr, vol. I, 45-46.) [redacted] testified that Dr. Collins was not a qualified independent evaluator or a mutually agreeable evaluator. (Tr. vol. I, 78; Pet. Ex, 33) Petitioners, however, stipulated that Dr. Collins is qualified as an expert in the assessment and evaluation of children with learning disabilities. (Stip. 23)

7. The District convened IEP meetings on August 23, 2013 and September 25, 2013 at which [redacted] IEP was developed as contemplated through the October 2012 settlement agreement. (Stip. Exs. 2 & 4.)

8. Petitioners filed a third due process petition which is the subject matter of this contested case in the Office of Administrative Hearings. The petition alleged that the District's proposed program for the 2013-2014 school year failed to provide [redacted] a free appropriate public education and, based on this claim, sought private placement at public expense for both the 2013-2014 and the 2014-2015 school years. (Pet. 1126; Tr. vol. I, 37-38, 111, 116,)

9. Petitioners are challenging the determination by [redacted] IEP team that [redacted] could be appropriately educated at [redacted] High School within the District and did not need

continued enrollment at [redacted] to receive a free appropriate public education. (Tr. vol. I, 110; Stip. Exs. 4 *& 5.)*

10. Petitioners contended that the District was unable to implement the IEP and that the staff did not have the appropriate level of training to deliver services to [redacted]. (Stip. Ex. 3; Tr. vol. I, 111-112, 153, 193-194; Tr. vol. III, 598; Tr. vol. V, 1130-1131, 1147.)

11. Both [redacted] and [redacted] testified that they do not trust the teachers, staff and administrators in the District. (Tr. vol. I, 172; Tr. vol. V, 964-965, 981.)

12. Petitioners also testified that [redacted] would be embarrassed and stigmatized if forced to attend a traditional public high school with children who do not have [redacted]. (Tr. vol. I, 109-111; Tr. vol. V, 956-957, 990-991.)

13. [redacted] describes his [redacted] as "not being able to read but figuring out ways around it." (Tr. vol. V, 946.) [redacted] gains meaning from text through accessing information that is provided to him without actually reading. (Tr. vol. V, 989-990.) Petitioner [redacted], [redacted] mother, testified that [redacted] accesses books through technology and "reads with his ears." (Tr. vol. I, 94-95.)

14. Dr. Rebecca Felton, an expert in the field of Child Development and Special Education, and in the assessment and evaluation of children with learning disabilities in the area of reading, testified that [redacted] remains in the fundamental stages of reading. (Stip. 22; Tr. vol. II, 438-439.) She testified that [redacted] evaluations indicate that he has severe deficits in all three of the language processing areas that are known to impact reading that we refer to as [redacted]. (Tr. vol. II, 321.) She testified that it is somewhat unusual to find students who have as severe deficits as he did in all areas. (Tr. vol. II, 322.)

15. Dr. Patricia Collins, an expert in the field of school psychology and the assessment and evaluation of children with learning disabilities, remains skeptical that [redacted] "basic reading skills can be brought to sufficient levels to support learning." (Stip. 23; Stip. Ex. 19.) She further testified that, "the appropriate reading instruction for [redacted] at this point in time is beyond my experience and expertise and is best left to those relatively few individuals with experience teaching students with this level of very significant challenges." (Stip. Exs. 19 & 23.)

THE AUGUST 2013 IEP MEETING AND THE DISTRICT'S PROPOSED PROGRAM FOR THE 2013-2014 SCHOOL YEAR

16. An IEP meeting was scheduled for August 23, 2013 to develop an IEP for [redacted] for the 2013-2014 school year. (Stip. Exs. 2 & 3). Prior to the IEP meeting, various members of [redacted] IEP team and District staff requested all available information about [redacted] and his educational program at [redacted]. (Tr. vol. I, 139-140; Tr. vol. III, 747.) Another request for school records was made on August 23. (Tr,. vol. II, 517-518.)

17. Carol Fish, the District's high school director for exceptional children's programs, facilitated the August IEP meeting and testified at the hearing as an expert in the field of teaching, the administration of special education in the public schools, and the curriculum for children with disabilities. (Tr. vol. III, 676, 743.)

18. It is a best practice to prepare a draft IEP to provide the IEP team a starting point for discussion at the actual meeting. (Tr. vol. III, 750.)

19. To develop the draft IEP, the team reviewed information about [redacted] available to the District at the time, consisting of the [redacted] Student Profile, [redacted] Term Reports, a 2012 outside evaluation completed by Dr. Cecile Naylor, and information in [redacted] records from [redacted] Academy and from his time in the District, (Stip. Exs. 2 & 3.)

20. The information received from [redacted] was of limited use to the IEP team in determining [redacted] present levels of performance because it only provided a snapshot of [redacted] performance at the beginning and end of the 2012-2013 school year, but did not provide the IEP team with information about the skills [redacted] had worked on or his level of mastery. There were anecdotal notes about [redacted] work ethic, but the notes did not provide specificity about what skills [redacted] worked on and his level of mastery. (Tr, vol. III, 745-746.)

21. The District requested specific progress monitoring from [redacted] program at [redacted] to determine the specific skills mastered in the Orton-Gillingham language training sessions, but did not receive this information from [redacted]. (Tr. vol. III, 502.)

22. Pursuant to the settlement agreement, the District had contracted with two private providers to evaluate [redacted].

23. Page Norris-Mikol, through the North Carolina Department of Health and Human Services Assistive Technology Program, conducted an assistive technology evaluation which was completed in June 2013 and the evaluation report was available in advance of the August 2013 IEP meeting. (Stip. Ex. 21.) In developing the draft IEP, District staff reviewed the assistive technology report and consulted with the District's assistive technology specialist regarding the recommendations. (Tr. vol. III, 750-751.)

24. Dr. Collins completed psychological and educational testing. (Stip. Ex. 19.) Dr. Collins evaluated [redacted] on August 16 and 19, 2013, and her report was not available to the IEP team at the time of the IEP meeting on August 23, 2013, (Stip. Ex. 19; Tr. vol. III, 763-764.)

25. A draft IEP was sent via email to Petitioners and their counsel to review in advance of the meeting. (Tr. vol. III, 792.)

26. Petitioners and their counsel, attended and participated in the August 23 IEP meeting. (Stip. Ex, 3.) District representatives at the meeting included Sam Dempsey, the District's executive director for exceptional children's programs; Sam Mills, general counsel for the Winston-Salem Forsyth County Schools; Ms. Fish; and special education and regular

education teachers who would work with [redacted] if he returned to the District. (Stip. Exs. 2 & 3.)

27. Mr. Dempsey testified at the hearing as an expert in the field of administration of special education in public schools and the curriculum of children with disabilities. (Tr. vol. III, 565.)

28. The goals in the draft IEP did not engender much discussion. The concerns Petitioners expressed in the meeting focused primarily on the qualifications and training of the teachers and the District's ability to implement the IEP. (Tr. vol. III, 598, 763.)

29. In the IEP, the reading and writing goals specifically mandate the use of a research-based methodology that systematically and explicitly provides direct instruction to [redacted]. (Stip. Ex. 2.)

30. Petitioners do not challenge the appropriateness of the goals in the IEP. (Tr. vol. V, 1143-1144)

31. During the IEP meeting, counsel for Petitioners asked the team what methodology was being proposed for use with [redacted]. (Tr. vol. I, 154; Stip, Ex. 3.) Petitioners were reassured that the District would continue the use of an Orton-Gillingham based program, similar to what was being used with [redacted] at [redacted] (Tr. vol. I, 160-161; Stip. Ex. 3.)

32. The District uses a variety of research-based reading methodologies and approaches to provide interventions to students with reading disabilities, including four different Orton-Gillingham based programs. (Tr, vol, III, 571.) The District selected the Orton-Gillingham-based approach developed by the Institute for Multi-Sensory Education (IMSE) as the approach to use with [redacted]. (Tr. vol. III, 573, 586.) The IMSE program is appropriate for use in an individual or group setting with students of any age who lack fundamental reading skills, such as students like [redacted]. (Tr, vol. III, 576-577, 743-744.)

33. As stated by Counsel, Petitioners do not challenge the appropriateness of the IMSE methodology for [redacted]. (Tr. vol. V, 1129-1130.)

34. Following the development of the present levels and goals, the IEP team discussed extensive accommodations and modifications that [redacted] would access in his special education and regular education classes, including: read aloud, dictation to scribe, scaffolded notes, modified assignments, preferential seating, mark in book, and second set of books. (Stip. Exs. 2 & 3.)

35. For testing, the team included extended time (time and a half) and small group/separate setting. (Stip. Ex. 2) [redacted] had received both of these testing accommodations during the previous year at [redacted]. (Tr. vol. V, 961.)

36. CS testified that as the IEP was presented in the meeting, she did not believe the District would be able to implement [redacted] testing accommodations in a manner that would not

stigmatize [redacted] or cause him to miss classroom instruction during his extended time. (Tr. vol. I, 91.)

37. Extended time and separate setting were common accommodations for students within the District and teachers regularly implement these accommodations without students missing class time or feeling different because they are going into another room for testing. (Tr. vol. III, 771-775.) CS testified that at the IEP meeting, [redacted] stated that he received assistance at night and on the weekends at [redacted] and that Sam Mills stated that this was not an accommodation the school was offering. (Tr. vol. I, 185.)

38. Dr. Felton testified that read aloud is not an allowable accommodation on English End-of-Course tests, and actually reading and passing an End-of-Course test in English would be a significant barrier for students like [redacted] to be eligible for graduation from a North Carolina public high School, (Tr. Vol, II, 347.)

39. Mr. Dempsey testified that passing an End-of-Course exam is no longer required to pass a course and to be eligible for graduation in North Carolina. Further, [redacted] would have been enrolled in English III during the 2013-2014 school year which did not have an End-of-Course exam, making Petitioners' point moot, (Tr. Vol. III, 587-588.)

40. As a part of the discussion about modifications and accommodations, the IEP team also had a lengthy conversation about what specific assistive technology would be necessary to address [redacted] needs, including technology that was recommended. (Tr. vol, I, 164-167; Tr. vol. III, 677.)

41. Petitioners actively participated in this discussion about assistive technology. (Tr. vol. III, 596-597; Stip. Ex, 3.) [redacted] informed the IEP team that he was most comfortable with and relied on Mac products in the school setting. (Tr. vol. V, 971.)

42. As a result of feedback from Petitioners, the IEP team added digital notes and use of a GoPro camera for video recording to the accommodations and modifications already listed in the draft IEP. (Tr, vol. III, 660-661.)

43. As a direct result of [redacted] expression that he was more familiar and comfortable with Mac products, the team also agreed to provide [redacted] with a MacBook computer and an iPad, (Tr. vol. III, 597, 523, 525.)

44. Other proposed assistive technology accommodations included audio books, talking word processor, dictation software, and live scribe pen. (Stip. Ex. 2.)

45. Petitioners contend that the use of assistive technology in the public school setting, particularly in a regular education classroom, could be isolating and stigmatizing for [redacted] if he is the only student accessing technology. (Tr. vol. IV, 917.)

46. Many students within the District use assistive technology, including devices to record class discussions, and the District's assistive technology team is familiar with supporting teachers

and students using assistive technology in the school setting. (Tr. vol. III, 601-602.) During the IEP meeting, Mr. Dempsey stepped out several times to discuss with the District's assistive technology specialist the logistics necessary to ensure all of [redacted] technology could be available for [redacted] by the following Monday. (Tr. vol. III, 530.)

47. After the discussion of accommodations and modifications, the IEP team discussed recommendations for special education service delivery. (Stip. Ex. 3.)

48. The August IEP included 90 minutes of one-on-one reading instruction each day. (Tr. vol. I, 178; Stip. Ex. 1) By comparison, [redacted] received 45 minutes per day of reading instruction during the previous school year at [redacted]. (Tr. vol. V, 1008-1009.)

49. The August IEP included 90 minutes of special education support in an inclusion general education classroom for two additional core class periods. (Stip. Ex. 2; Tr. vol. I, 178-179.)

50. The team described to Petitioners how instruction is delivered to a student in an inclusion setting. (Stip. Ex. 3.) Inclusion classes are co-taught by both a special education teacher and a regular education teacher in the same classroom at the same time, who are present to address issues that a student may have acquiring or maintaining information or practicing a skill. (Tr. vol. III, 616.)

51. The regular education and special education teachers in the inclusion setting often co-plan together to ensure that lessons are differentiated to individual students' needs. (Tr. vol. III, 617.) The special education teacher would be available in the classroom to monitor the needs of the special education students, and spend small group and individual time with students to ensure that they are understanding and accessing the lessons being taught in the classroom. (Tr. vol. III, 618.)

52. [redacted] testified that her definition of inclusion was the number of students in the classroom. (Tr. vol. I, 169.) Although this is not how the IEP team explained inclusion classes to Petitioners, the District was mindful of Petitioners' concerns about class size and would have placed [redacted] in the smallest inclusion classes available. (Tr. vol. III, 755-756.)

53. Ms. Fish testified that the team was planning to enroll [redacted] in an English class with approximately 20 students in a classroom with both a special education and regular education teacher, providing a student-teacher ratio of 10:1, (Tr. vol. III, 756.)

54. The previous year at [redacted], [redacted] classes had a student-teacher ratio ranging from 8:1 to 12:1. (Tr. vol. V, 1004.)

55. Following the discussion of special education service delivery, the IEP team discussed a continuum of educational placements for [redacted], including regular, resource, separate, and private residential placements. (Tr. vol. III, 718-719.)

56. The IEP team rejected a regular education placement because it would not provide [redacted] with enough special education time and support to meet [redacted] needs. (Tr. vol. III, 719.)

57. The IEP team also rejected a separate or residential placement because it would be too restrictive and would not allow [redacted] enough time to access the general curriculum or typically developing peers. (Tr, vol. III, 719.)

58. The IEP team determined that a resource level of special education services in a public school within the District would be appropriate for [redacted]. (Stip. Exs. 2 & 3.)

59. Petitioners did not request private placement for [redacted] during the August 2013 IEP meeting. (Tr. vol. III, 752.)

60. During the contested case hearing, Petitioners argued that their concern was the level of training and experience of the teachers who would be working with [redacted]. (Tr. vol. V, 1129-1130.)

61. Mr. Dempsey testified that the District provides 30 hours of training in the IMSE program to special education teachers, which covers fundamental reading skills appropriate for students of any age by outside trainers at District expense. (Tr. vol. III, 575,) The District provides ongoing support to teachers using the IMSE approach through the District's literacy coaches. (Tr. vol. III, 578-579.) Teachers working with students at the high school level select materials for use with the IMSE program that are age appropriate and topics of interest to the individual students. (Tr. vol. III, 744.)

62. Ms. Azuree Dalton, the teacher selected by the District to provide [redacted] with direct one-on-one instruction using IMSE, attended the August 2013 IEP meeting. (Tr. vol. III, 586; Stip. Exs. 2 & 3.) Ms. Dalton is an experienced teacher who was selected to receive the IMSE training because she had already been trained in another reading methodology and had experienced success in implementing those methods with students with severe reading disabilities. (Tr. vol. III, 748.)

63. At the time of the meeting, Ms. Dalton had received 30 hours of training in the IMSE program, (Tr. vol. III, 586; Pet'rs Ex, 6.) Ms. Dalton also received training in other types of reading programs and interventions, including 30 hours of training in Reading Foundations, a program developed by Dr. Felton, and had several years of experience working with multiple children with learning disabilities and significant reading problems. (Tr, vol. III, 640; Pet'rs Ex, 6.)

64. Two District literacy coaches, Darla Sullivan and Alandous Hawkins, were assigned to supervise Ms. Dalton's implementation of the IMSE program with [redacted]. (Tr. vol. III, 586-587.) Both Ms. Sullivan and Mr. Hawkins attended the August 2013 IEP meeting. (Stip. Exs. 2 & 3.)

65, The District also intended for Ms. Emily Houlditch, another teacher at [redacted] High School, to provide [redacted] with special education support in his regular education and special education classes. (Tr. vol. III, 607.) Ms. Houlditch attended the August 2013 IEP meeting. (Stip. Exs. 2 & 3.)

66. Ms. Houlditch was dually certified in both regular education and special education, had received the 30 hours of training in Reading Foundations, and was scheduled to complete the IMSE training that fall, (Tr. Vol. III, 607, 757; Pet'rs Ex, 6.) Ms. Houlditch was trained in the IMSE program on December 18, 2013. (Tr. vol. II, 634-635.)

67. [redacted] English class would have been an inclusion class with a special education teacher who was dually certified in special education and regular education and who would have had IMSE and Reading Foundations training. (Tr. vol. III, 617-618.)

68. Called on behalf of Petitioners, Dr. Felton testified that, based on what she knew, the IMSE program would not be appropriate for a student at a high school level who has a severe reading disability. (Tr. vol. II, 380.) She testified that her knowledge of the program was limited to what she has read about the program online. (Tr. vol. II, 379.)

69. Dr. Felton testified that she was not familiar with the specific training or experience of the teachers who would be providing instruction to [redacted] in the inclusion classroom at [redacted] High School. (Tr. vol. II, 441464-465.)

70. Dr. Felton testified that, in a small teacher-pupil ratio, an inclusion classroom could work for a student with a profile similar to [redacted] with a properly trained teacher. (Tr, vol. II, 452.)

71, Dr. Frank Wood, another witness for Petitioners, an expert in the field of neuropsychology, testified as an expert in the assessment, evaluation and management of children with learning disabilities which includes reading disabilities and [redacted]. (Tr. vol. IV, 863; Stip. 21.)

72. Dr. Wood testified that he was familiar with the IMSE program. (Tr, vol. IV, 898.)

73, Dr. Wood testified that he had not visited an inclusion classroom at [redacted] High School in recent years and was not familiar with inclusion classes that had been successfully used with students like [redacted] with serious reading disabilities, (Tr. vol. IV, 914.)

74, Dr. Wood contended that a teacher working with [redacted] should have more than 30 hours of IMSE training but he was unfamiliar with the complete teaching experience and training backgrounds of Ms. Dalton and Ms. Houlditch. (Tr. vol. IV, 901, 918.)

75. The Undersigned finds the testimony of Mr. Dempsey and Ms. Fish to be more persuasive than the testimony of Dr. Felton and Dr. Wood on the issue of the implementation of special education programming in public schools and curriculum for children with disabilities because of their education credentials and extensive experience with both the teaching and administration of special education programming in public schools.

76. At the end of the IEP meeting on Friday, August 23, 2013, the Petitioners did not reject the IEP that was developed by the team, nor did they indicate that they did not feel the IEP was designed to provide [redacted] with a free appropriate public education. (Tr. vol. III, 599; Stip. Exs. 2 & 3,)

77. The IEP team believed that [redacted] would be attending [redacted] High School on Monday, August 26, 2013, the first day of the 2013-2014 school year. (Tr. vol. III, 595, 752.)

78. The Petitioners and District staff chose September 12, 2013 as the date for the next IEP meeting to discuss the results of the District's recent outside psychological and educational evaluation by Dr. Collins. (Tr. vol. I, 223.)

DISTRICT'S ACTIONS AFTER THE AUGUST IEP MEETING TO PREPARE FOR [redacted] ARRIVAL ON MONDAY

79. At the time of the meeting on Friday, August 23, [redacted] was not enrolled in the District. (Tr. vol. III, 589.) Following the IEP meeting, Petitioners' attorney asked for an enrollment packet for Trey. (Tr. vol. I, 169; Tr. vol. III, 673.) A guidance counselor from the school met the Petitioners, discussed a proposed class schedule, and the IEP team made multiple reassurances that everything would be ready for [redacted] to begin school on Monday, August 26. (Tr. vol. III, 527, 542-543, 636.)

80. Mr. Dempsey immediately left the IEP meeting and purchased a MacBook and GoPro camera for [redacted], prior to attending to a medical emergency in his immediate family that required him to fly out-of-state. (Tr. vol. III, 523-525, 753.) He bought the items on his personal credit card (rather than executing a requisition through the school system) to ensure that the items would be ready for [redacted] on Monday. (Tr. vol. III, 524, 528; Pet'rs Ex. 17.) It was Mr. Dempsey's belief that [redacted] would be enrolling at [redacted] High School on Monday morning, or he would not have delayed dealing with his family crisis. (Tr. vol. III, 595.)

81 Also that afternoon after the IEP meeting, District staff, including Ms. Fish, the school principal, the guidance counselor, and the special education case manager, met to discuss the selection of classes for [redacted] that would be taught by teachers who had experience working in co-teaching settings and who had worked with special education students with very significant disabilities, (Tr. vol. III, 753-755.)

82. To further ensure that the team was prepared for [redacted] on Monday, Ms. Fish again met with the guidance counselor and the case manager at the school on Sunday afternoon to finalize [redacted] class schedule. (Tr. vol. III, 755.)

83. The District's assistive technology specialist and a technology facilitator also were contacted to prepare [redacted] technology for use on Monday morning. (Tr. vol. III, 753-754.)

84. On Monday morning, prior to the start of the school day, Ms. Fish met with [redacted] teachers to review [redacted] IEP, including a review of the accommodations and modifications for his classes and his assistive technology. (Tr, vol. HI, 762.) By 7:30am that Monday, both Ms. Fish and the District's assistive technology specialist were in place and awaiting [redacted] arrival to be sure his technology was properly configured. They waited for [redacted] until approximately noon, but he never arrived. (Tr. vol. III, 761-762.)

85, When [redacted] failed to arrive for school on Monday, in-house counsel for the District contacted Petitioners' attorney who responded that [redacted] was experiencing some anxiety but would be enrolling that day. (Tr. vol. III, 771; Resp't Ex. 8.)

86. In-house counsel also contacted Petitioners' attorney on Monday to inform her that the IEP team had an idea about a schedule change to place [redacted] in an additional special education class that would provide him with more academic support for his transition back to public school. (Resp't Ex. 8.)

87. Counsel offered to discuss this proposal at the next IEP meeting scheduled for September 12, or sooner, if Petitioners wanted to schedule another brief meeting. (Resp't Ex.8)

88. [redacted] was aware of this request, but no evidence was offered that Petitioners responded to the District's request to convene this IEP meeting. (Resp't Ex.8)

89. Throughout the week, Respondent's in-house counsel continued to contact Petitioners' counsel to inform her that the District was ready and looking forward to serving [redacted]. (Resp't Ex. 9.)

90. Petitioners did not contact the District to inform them that [redacted] would not be enrolling. (Tr. vol. III, 599, 623.)

91, Petitioners only contact with the District between the August and September IEP meetings was to request that the IEP meeting originally scheduled for September 12 be delayed to the week of September 23 to allow time for Petitioners to prepare with their new attorney. (Tr. vol. I, 229; Resp't Ex. 11.)

THE SEPTEMBER 2013 IEP MEETING

92. The second IEP meeting was rescheduled for September 25, 2013. (Tr, vol. III, 600, 768-769; Stip. Ex, 4.) Ms. Fish again facilitated the meeting, and the purpose of the meeting was to review evaluation results and make changes to the IEP as necessary. (Stip. Ex, 5.)

93, Prior to the IEP meeting, Petitioners and representatives from the District each attended interpretive conferences with Dr. Collins to discuss the results of her August 2013 evaluation. (Tr. vol. I, 102; Tr. vol. III, 764.)

94. Ms. Fish and the two literacy specialists who participated in the August IEP meeting attended the District's conference with Dr. Collins. They discussed the IEP that was developed for [redacted] at the August meeting. (Tr. vol. III, 764-766, 817-818.)

95. Dr. Collins testified that the IEP that the District had developed for [redacted] was a good educational plan and that she had not seen another public school district go to this extent to provide special education services to a student. (Tr. vol. IV, 818-819.)

96. [redacted], [redacted], and their new counsel attended the September 25 IEP meeting. (Stip. Exs. 4 & 5.) The team was surprised that [redacted] was not present and asked Petitioners if he would be attending the meeting, but Petitioners did not provide an explanation for [redacted] whereabouts. (Tr. vol. III, 601, 769.)

97. The team began the meeting with a review of Dr. Collins' evaluation. (Stip. Ex. 5.) Dr. Corliss Thompson-Drew, lead psychologist for the District, attended the meeting to interpret the evaluation results. (Tr, vol. IV, 828.)

98. Dr. Thompson-Drew testified at the hearing as an expert in the field of school psychology and the evaluation of children with disabilities. (Tr. vol. IV, 841.)

99. Prior to the IEP meeting, Dr. Thompson-Drew held a telephone conference with Dr. Collins to discuss the evaluation results and to clarify her recommendations. (Tr. vol. IV, 828-829.) Dr. Thompson-Drew also reviewed older psychological reports for [redacted] as far back as second grade and identified a discernible pattern that [redacted] reading scores were significantly delayed. (Tr. vol. IV, 842.)

100. Dr. Collins' evaluation showed that [redacted] continued to have deficits in basic reading and that his reading skills were at roughly a second grade level. (Tr. vol. IV, 844; Stip. Ex. 19.) Her report noted that [redacted] instruction at [redacted] had resulted in some progress in decoding of phonetically regular words, but had limited effect on [redacted] ability to decode a more generalized span of word challenges, his reading fluency, or his reading comprehension. (Stip. Ex. 19.)

101. Dr. Collins noted in her report that she remained skeptical that [redacted] reading skills could be brought to a level to support learning or to pass a high school curriculum. She recommended intense instruction in a specialized setting, small class size, and assistive technology to support [redacted] learning. (Stip. Ex. 19.)

102. Dr. Collins also recommended that the District consider [redacted] comfort in his learning environment to address his potential anxiety over functioning in a school setting as a high school non-reader (Stip. Ex. 19.)

103. Dr. Collins does not state that [redacted] could only be served in a private residential setting.

104. To address concerns about [redacted] comfort level during his transition to public school, Ms. Fish testified that the IEP team considered identifying teachers and other "go-to" people to provide [redacted] support in the public school setting, (Tr, vol. III, 735.)

105. Ms. Fish testified that Dr. Collins's evaluation was consistent with Trey's previous testing and, as a result, there was no need to make changes to the IEP goals. (Tr. vol. III, 767768.)

106. The team incorporated the updated data from Dr. Collins's report in the IEP present levels of performance. (Stip. Ex. 10.)

107, The Undersigned finds the testimony and report of Dr. Collins to be credible and persuasive.

108. The IEP team also fully reviewed the assistive technology evaluation at the September meeting. (Tr. vol. III, 768.) At the request of Petitioners, the team removed the scribe pen from the assistive technology accommodations. (Ti', vol. III, 597; Stip. Exs. 4 & 5.) Petitioners also were reassured that all assistive technology devices discussed at the August meeting were in the building and ready for [redacted] use. (Stip. Ex. 5.)

109. Mid-way through the meeting, Petitioners were asked whether there was any additional information they wanted to share with the IEP team. (Tr. vol. I, 207; Tr. vol. III, 609-610; Stip. Ex. 5.)

110. The meeting paused while Petitioners privately consulted with their attorney. (Stip. Ex. 5.) Upon their return, Petitioners provided a copy of a report from Dr. Naylor following an evaluation in June 2013, as well as a Consultation Report from Dr. Doreen Hughes, a psychiatrist Petitioners met for a consultation on August 29, a week after the August IEP meeting. (Tr. vol. I, 132,145, 207-208; Tr, vol. III, 609-610; Stip. Exs, 5 & 20,)

111. Dr. Hughes is an expert in the field of psychiatry and behavioral medicine, (Stip, 20,)

112. The IEP team then reviewed this new information which was not available to them at the August IEP meeting. (Tr. vol. III, 609-610, 615.)

113. The report from Dr. Naylor was consistent with Dr. Collins's evaluation as well as [redacted] previous evaluations. *(See* Stip. Exs. 19 & 20.) Her report recommended that [redacted] continue to receive intensive and systematic instruction in reading as well as assistive technology to accommodate his severe learning disability. (Stip, Ex. 20.)

114. Dr. Naylor's report does not state that [redacted] requires private residential placement.

115. The team then reviewed Dr. Hughes's report, provided by Petitioners during the meeting. (Stip. Ex, 5.) CS testified that she received the Consultation Report from Dr. Hughes on August 30, the day after [redacted] visit. (Tr. vol, I, 208.)

116. There is no evidence in the record to indicate that the District was aware that [redacted] had met with Dr. Hughes or that the consultative report was available prior to the September meeting.

117. Dr. Hughes testified as an expert in the field of psychiatry and behavioral medicine. (Stip. 20).

118. Dr. Hughes testified that she was not an educational expert and had no knowledge regarding the education program offered to [redacted] at the August meeting. (Tr, vol, II, 293-294.)

119. During his consultation with Dr. Hughes on August 29, [redacted] was calm and articulate, he did not seem depressed, nor was he experiencing any suicidal ideations. (Tr. vol. II, 287.) [redacted] told her that he did not want to go to public school and that his options for school were [redacted] or nothing. (Tr. vol. II, 281.)

120. Petitioners told Dr. Hughes that they did not trust the school system and that the purpose of the August 23 IEP meeting was to impose private pay responsibilities onto the school. (Tr. vol. I, 202; Tr. vol. II, 289.)

121. In her report, Dr. Hughes concurs with Dr. Naylor's recommendations in the 2013 evaluation report regarding [redacted] need for an educational placement that offers intense and systematic instruction. She does not state that [redacted] requires private residential school placement. (Stip. Ex. 22.)

122. Dr. Hughes testified that [redacted] has experienced school-related anxiety from a very young age continuing through today at both public and private schools. (Tr. vol. II, 308; Resp't Ex. 5.)

123. [redacted] episodes of anxiety about school continued during his transition to [redacted]. (Tr. vol. V, 962, 976, 1015)

124. Dr. Hughes testified that she was not aware of a situation in which [redacted] was not able to work through and continue in his educational program and that it is a standard recommendation for patients who suffer from anxiety to continue going to school. (Tr. vol. II, 308, 311.)

125. In her report, Dr. Hughes diagnosed [redacted] with adjustment disorder with anxiety because [redacted] was experiencing very significant anxiety symptoms in relation to the issues around school. (Tr. vol. II, 275.) This diagnosis is episodic and she gave [redacted] this diagnosis because he did not meet the criteria for any other anxiety disorder. (Tr. vol. II, 275.)

126. Dr. Hughes testified that [redacted] was not suicidal. (Tr. vol. II, 287.)

127. This Undersigned finds the testimony and report of Dr. Hughes to be credible on the issue of [redacted] emotional state following the August 2013 IEP meeting.

128. At the September meeting, the IEP team added another 90-minute special education class to [redacted] schedule for 22 times a reporting period, approximately every other day, to receive support in study skills. (Tr. vol. III, 620.)

129. The additional class would provide [redacted] with more time to work on skill deficits, to get curriculum assistance to work on assistive technology instruction, and to provide supports for his core classes. The study skills teacher would collaborate with [redacted] other curriculum teachers to support Trey's needs. (Tr. vol. III, 728-729.)

130. The additional class only had three or four students and was taught by a teacher with IMSE training and Reading Foundations training. (Tr. vol. III, 607.) The students in the additional class were similarly situated to [redacted] with significant reading deficits and used extensive assistive technology. (Tr, vol. III, 620.)

131. This additional class was made in direct response to concerns raised by Petitioners at the August 2013 meeting that [redacted] could become overwhelmed in his core classes, (Stip. Ex. 3.)

132. Per the September 2013 IEP, [redacted] schedule would have included two 90-minute blocks of special education services in a small group setting, one 90-minute inclusion class co-taught by a special education teacher and a regular education teacher, and one additional elective course, (Tr. vol. III, 1129-1130.)

133. Mr. Dempsey interpreted the various evaluations reviewed by the team as recommending small classes, assistive technology, and placement in an educational setting that offered continued emphasis on specialized, intense, and systematic instruction in reading, all items that the District was offering. (Tr. vol. III, 561-562, 603.)

134. The District also offered to [redacted] a setting with small class sizes, students who are similarly challenged, and teachers trained in and sensitive to learning differences. (Tr. vol. III, 603-606.)

135. After an IEP is developed for a student, it is the responsibility of District administration to determine additional staffing to support students' needs. (Tr, vol. III, 619.)

136. [redacted] High School has a history of creating small classes with dually certified teachers in core content areas, If [redacted] had attended the school and it became clear that he needed a smaller classroom environment, then an IEP meeting could have convened to discuss placement in a smaller setting. (Tr. vol. III, 769-770.)

137. [redacted] and her counsel attempted to argue in the September meeting that it would be detrimental to T[redacted] mental health for him to attend [redacted] High School. (Tr, vol. III, 738; Stip. Ex. 5.)

138. Dr. Naylor's evaluation indicated that [redacted] was well-adjusted and reported strong self-esteem and interpersonal relations. (Stip. Ex. 20.)

139. Through the course of the hearing, the District learned that over the weekend immediately following the August IEP meeting, [redacted] conduct concerned his parents and they took him to see Dr. Frank Wood on Sunday. (Tr. vol. IV, 905.) There is no evidence in the record to indicate that the District was aware of this meeting before the filing of the within due process petition.

140. Dr. Wood was accepted as an expert in the field of neuropsychology. He testified that [redacted] was emotionally upset during their consultation, but was not suicidal. (Stip. 21.) He informed [redacted] that [redacted] was not clinically suicidal, that he recommended that [redacted] and his

mother discuss and decide whether he should attend school on Monday, and that there was an intentional decision made by him and Petitioners' attorney not to put anything in writing concerning his meeting with [redacted]. (Tr. vol. IV, 905-907, 922, 931-932.)

141. At the end of the September meeting, Petitioners rejected the IEP and informed the team that [redacted] was attending [redacted] and would be staying at [redacted]. (Stip. Ex. 5.)

142. Neither Petitioners nor their legal counsel had previously informed the District that [redacted] was being enrolled in the private school. (Tr. vol. I, 227; Tr, vol. III, 770.)

143. Through the course of this hearing, the District learned that on September 12 (the original date for the second IEP meeting) Petitioners were at [redacted] with [redacted]. (Tr. vol. I, 229.) Petitioners signed an enrollment contract at [redacted] for the 2013-2014 school year on September 13, the first day of class at [redacted] for the 2013-2014 school year. (Tr. vol. V, 1024; Pet'rs Ex. 2.)

144. There is no evidence in the record that Petitioners made any further contact with the District prior to filing the third due process petition in August of 2014.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction over this contested case pursuant to Chapters 115C and 150B of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.* and implementing regulations, 34 CFR Parts 300 and 301. N.C. Gen. Stat. § 115C-109.6(a) controls the issues to be reviewed. To the extent that the Findings of Fact contain conclusions of law, or that the Conclusions of Law are findings of fact, they should be so considered without regard to the given labels.

2. The IDEA is the federal statute governing education of students with disabilities. The federal regulations promulgated under IDEA are codified at 34 CFR Parts 300 and 301.

3. The District is a local education agency (LEA) receiving funds pursuant to the IDEA.

4. The controlling state law for students with disabilities is N.C. Gen. Stat. § 115C, Article 9 and the corresponding state regulations, including the Policies Governing Services for Children with Disabilities.

5. An LEA is required to provide a disabled student with educational instruction that is uniquely designed to meet the student's needs through an IEP that is reasonably calculated to enable him to receive educational benefit. *See e.g. Hendrick Hudson Bd. of Educ. v. Rowley,* 458 U.S. 176, 188-89 (1982); *MS. ex rel. Simchick v. Fairfax County Sch. Bd.,* 553 F.3d 315, 320 (4th Cir. 2009).

6. School districts are not charged with providing the best program, but only a program that is designed to provide the child with an opportunity for a free appropriate public education. *Rowley,* 458 U.S. at 189-190. The public school district satisfies this test if it provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Burke County Bd. of Educ. v. Denton,* 895 F.2d 973, 980 (4th Cir. 1990) (quoting *Rowley,* 458 U.S. at 203). The IDEA requires an education plan likely to produce progress, not regression or trivial educational advancement. *Hall v. Vance County Bd of Educ.,* 774 F.2d 629, 636 (4th Cir. 1985).

7. While IDEA requires an LEA to provide specialized instruction and related services "sufficient to confer some educational benefit upon the handicapped child", IDEA does not require "the furnishing of every special service necessary to maximize each handicapped child's potential." *Hartmann v. Loudoun County Bd, of Educ.,* 118 F.3d 996, 1001 (4t^{h} Cir.1997) (quoting *Rowley,* 458 U.S. at 199-200).

8. A court's role in reviewing the administrative proceeding concerning IDEA "is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities they review." *Rowley,* 458 U.S. at 206; *accord Hartmann,* 118 F.3d at 999. The Supreme Court has directed that "courts must be careful to avoid imposing their view of preferable educational methods upon the States." *Rowley,* 458 U.S, at 207. Courts must defer to educators' decisions as long as an IEP provides the child "the basic floor of opportunity that access to special education and related services provides." *Tice v. Botetourt County Sch, Bd.,* 908 F.2d 1200, 1207 (4th Cir. 1990)(citation omitted; quoting *Rowley,* 458 U.S. at 201).

9. The IDEA enumerates specific requirements with regard to the content of the IEP document, and there is no requirement that additional information be included in the IEP. 20 USC § 1414(d)(1)(A); 34 CFR 300.320. An IEP must detail the student's current status, set forth annual goals for the student, and state the special services and other aids that will be provided to the child, as well as the extent to which the child will be mainstreamed. *MM ex rel DM v. Sch. Dist, of Greenville County,* 303 F.3d 523, 527 (4th Cir. 2002); 20 USC § 1414(d)(1)(A).

10. Instructional methodology, identity of teaching personnel, and qualifications and training of personnel are not decisions of the IEP team and there is no requirement or expectation that this information be included in an IEP. *See S.M. v. Hawari Dept. of Educ.,* 808 F.Supp.2d 1269 (D,Haw.2011); *.I. L. v. Mercer Island Sch. Dist.,* 592 F3 d. 938 (9th Cir. 2010).

11. Further, each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. 34 CFR § 300.551. In determining the educational placement of a child with a disability, each public agency must ensure that the placement is in the least restrictive environment ("LRE"). Under the LRE requirements of the IDEA, the 'placement must be (1) determined at least annually; (2) based on the child's IEP; and (3) as close as possible to the child's home. In selecting the LRE, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 CFR § 300.552.

12. Once a school has formulated a procedurally proper IEP, a reviewing court should be reluctant to second-guess the judgment of education professionals, and neither parents nor courts have a right to compel a school district to employ a specific methodology in educating a student. *See Rowley,* 458 U.S. at 206-08; *see also W.R. v. Union Beach Bd. of Educ.,* 414 Fed. Appx. 499 (3d Cir. 2011) (holding that a school district complied with the procedural requirements of IDEA where the district informed parents generally that the child would receive instruction using a multi-sensory reading program).

13. Petitioners bear the burden of proving that (1) the educational program offered by the LEA is inappropriate and (2) the educational program they chose is appropriate. *School Comm, of the Town of Burlington, Mass. v. Dep't of Educ, of the Commonwealth of Mass.,* 471 U.S. 359, 370 (1985); *Florence County Sch. Dist. Four v, Carter,* 510 U.S. 7 (1993). A court may require that an LEA reimburse parents for the cost of enrollment of a private placement if the court finds first that the LEA denied the child a free appropriate public education (FAPE), and also that the private placement is appropriate. *See* 34 CFR § 300.148(c), A court's evaluation of whether the public program offered a FAPE is done consistently with the *Rowley* standard, and without comparison to the private placement. *Lewis v. Sch. Bd of Loudoun County,* 808 F.Supp. 523 (E.D. Va. 1992); *see also Redding Elem. Sch. Dist. v. Goyne,* 34 IDELR 118, 34 LRP 29 (E.D. Cal. 2001) (finding that that the hearing officer's erroneous comparison of the LEA's proposed program to the private program placed an impossible burden on the LEA, and that there was no requirement for the LEA to duplicate the level of comfort the student experienced in the private school environment). If a court finds that that IEP offered by an LEA was procedurally and substantively appropriate, the parents are not entitled to reimbursement. *A. C, ex rel M.C. v. Bd, of Educ, of the Chappaqua Cent, Sch. Dist.,* 553 F.3c1, 165 (2d Cir. 2009).

14. Under the IDEA's "10 clay rule," a parental request for private school reimbursement can be reduced or denied if, (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information. 20 U.S.C. § 1412(a)(10)(C)(iii)(I); 34 CFR 300.148(d)(1); *see also Covington v. Yuba City Unified Sch, Dist.,* 780 F.Supp.2d 1014 (E.D. Cal. 2011) (denying parents' request for reimbursement where they failed to provide requisite timely notice to the public school district before enrolling student in the private school); *K.S. and MS. on behalf of A.S. v. Summit Bd Of Educ.,* 63 IDELR 253, 114 LRP 33062 (D. NJ 2014) (denying petitioners' claim for reimbursement on the basis that parents did not provide written notice of the unilateral placement until one week after the student began attending a private boarding school).

15. [redacted] is a child with a disability for the purposes of the IDEA and a child with special needs within the meaning of N.C. Gen. Stat. Chapter 115C, Article 9. As such, [redacted] is entitled to a FAPE from the LEA in which he is domiciled.

16. Petitioners' current request for reimbursement stems from their assertion that the District failed to offer [redacted] an appropriate educational program for the 2013-2014 school year, and that as a result, that Petitioners should receive two years of tuition reimbursement (for both the 2013-2014 and 2014-2015 school years).

17. In August and September of 2013, through the IEP team process, the District developed an IEP that was based on information that was available to the team at the time. At the hearing, Petitioners, through counsel, acknowledged that both the goals and the selected methodology were appropriate to meet [redacted] needs.

18. Both IEPs included extensive accommodations and modifications, including assistive technology, to facilitate [redacted] access to the general curriculum. The IEPs included 90 minutes of one-on-one special education instruction using a research-based methodology to systematically and explicitly provide direct instruction to [redacted], as well as placement in an inclusion classroom dually taught by both a general education teacher and a special education teacher for his core content classes. Further, the September IEP added an additional 90 minutes of support in a small group setting every other day to provide additional assistance across all content areas.

19. The District's proposed educational placement at [redacted] High School was [redacted] LRE, offering [redacted] an opportunity to generalize any academic or life skills in an environment that includes typically developing peers in a high school close to his home, The Undersigned finds that Petitioners have failed to demonstrate that the 2013-2014 IEP was not reasonably calculated to enable [redacted] to receive educational benefit.

20. Petitioners withheld outside evaluation information from the IEP team, as well as information about [redacted] visits to outside providers and his diagnosis of adjustment disorder with anxiety following the August IEP meeting. An IEP team can only make decisions based on information about the child that is available at the time of a meeting. Parent participation in the development of the IEP is expected, and "before they can fairly argue that the best the school authorities had to offer was or is not good enough, the critical pre-requisite is that the parents must have cooperated with the school authorities ... to try to develop the IEP,"S,M *v. Weast,* 240 F.Supp.2d 426, 436 (D.Md. 2003), A parent may not withhold critical information from the IEP team and then claim that FAPE was not provided. *See Id.* at 437,

21. Petitioners' primary concern was their belief that staff at [redacted] High School did not have the training and capacity to implement the goals, accommodations, and modifications in the IEP. Petitioners testified to their lack of trust in the District. The law is well-settled that instructional methodology, identity of teaching personnel, and qualifications and training of personnel are administrative decisions left to educational professionals, and are not decisions to be made with or by the parent through the IEP team process. Further, notwithstanding Petitioners' feelings about the District's educational program or personnel, lack of trust is not an element of FAPE. *See* 34 CFR § 300,17; *see also* 34 CFR § 104.33.

22. Having failed to meet the first prong of the *Burlington* analysis by failing to demonstrate the program offered was inappropriate, Petitioners, as a matter of law, have no legal claim to

tuition reimbursement. Petitioners' have failed to show that the program offered by the District was inappropriate, thereby making any further analysis unnecessary.

23. The Undersigned also independently finds that Petitioners' claim for private school reimbursement is further barred as a result of Petitioners' failure to provide the District with 10 days' notice prior to enrolling [redacted] in The [redacted] School. It is uncontested that [redacted] had been enrolled in and attending The [redacted] School since September 13, 2013, while Petitioners did not inform the District until the September 25 IEP meeting that he would not be returning to the District.

24. Petitioners' claim for reimbursement fails because Petitioners did not demonstrate that the program offered by the District was inappropriate, thereby making analysis of the second prong of *Burlington* unnecessary.

25. The law is well-settled that reimbursement under the IDEA is a "backward-looking form of remedial relief." See Burlington, 471 U.S. at 371-72; *Diaz-Fonseca v. Puerto Rico,* 451 F.3d 13 (1st Cir. 2006). To hold that private school tuition is reimbursable based on prior years' violations of the IDEA would permit a parent to enroll his or her child in private school indefinitely at taxpayer expense. *See Yancey v. New Baltimore City Bd. of Sch. Comm'rs,* 24 F.Supp.2d 512, 514 (D.Md.1998).

26. Petitioners are not entitled to prospective relief for their private program for the 2014-2015 school year based on any claims that [redacted] was not offered a FAPE at the start of the previous school year.

27. Petitioners did not raise as an issue before the Undersigned whether the District failed to offer [redacted] a FAPE for the 2014-2015 school year. Regardless of whether the District failed to offer Trey a FAPE during 2013-2014, [redacted] is not entitled to attend private school at public expense the following year without first alleging that the public school could not, or would not, provide FAPE during the current school year.

28. Petitioners have failed to show that the District's educational program offered to [redacted] for the 2013-2014 school year was inappropriate. Petitioners also have failed to show that [redacted] made sufficient educational progress during the 2012-2013 school year at [redacted] to justify that continued placement in their highly restrictive private program would be appropriate for the 2013-2014 school year. Moreover, Petitioners' ability to recover reimbursement for the 2013-2014 school year is limited as a matter of law due to their failure to provide the District with the 10 days' notice required under the IDEA prior to enrolling [redacted] in The [redacted] School for the 2013-2014 school year.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following:

FINAL DECISION

1. Petitioners had the burden of proof on all issues pending before the Office of Administrative Hearings.

2. Petitioners failed to meet their burden that Respondent failed to offer [redacted] a free appropriate public education for the 2013-2014 school year.

3. The IEP developed on August 23, 2013 and September 25, 2013 offered

4. [redacted] a free appropriate public education for the 2013-2014 school year.

5. Petitioners failed to prove that Respondent did not have the capacity to implement the IEPs developed for the 2013-2014 school year or that the teachers assigned to implement [redacted] special education services were not sufficiently trained.

6. Even if Petitioners had met their burden that Respondent failed to offer [redacted] a free appropriate public education for the 2013-2014 school year, Petitioners failed to show that they had a legal claim for reimbursement for the private program selected for the 2013-2014 school year because Petitioners failed to comply by the 10-day rule and failed to show that their private program was appropriate.

7. As a matter of law, Petitioners are not entitled to reimbursement for the private program selected for the 2014-2015 school year based on an alleged denial of a free appropriate public education in the 2013-2014 school year.

8. Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that all of Petitioners' claims are DISMISSED WITH PREJUDICE.

NOTICE

In order to appeal this Final Decision, the person seeking review must file a written notice of appeal with the North Carolina Superintendent of Public Instruction. The written notice of appeal must be filed within thirty (30) days after the person is served with a copy of this Final Decision. N.C. Gen Stat §§ 115C-116(h) and (i).

This the 27th day of February, 2015.

Selina M. Brooks

Selina M. Brooks
Administrative Law Judge